

Judge upholds Grace damages

BY ERICKA SCHENCK SMITH
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Molloy orders company to pay full cost of Superfund asbestos cleanup in Libby

W.R. Grace and Co. owes the federal government every penny sought in a \$54.5 million lawsuit aimed at getting the company to pay for Superfund cleanup costs in Libby, U.S. District Judge Donald Molloy ruled in an order filed late Tuesday.

"We thought we were right on these issues, and we thought Grace should be paying for this - and clearly the judge thought so as well," said Paul Peronard, former on-site coordinator for the U.S.

Environmental Protection Agency's emergency asbestos cleanup in the northwestern Montana town.

The EPA started work in Libby after November 1999 news reports detailed how asbestos from a former W.R. Grace and Co. vermiculite mine had sickened hundreds of residents. Asbestos is a contaminant of the local vermiculite ore.

Grace spokesman Bill Corcoran said late Wednesday that he had just received Molloy's 84-page order and would not be able to speak about it until Thursday.

"I feel like I owe the judge at least the respect to read the opinion before I comment on it," Corcoran said.

The EPA sued Grace in March 2001,

seeking repayment of cleanup costs through Dec. 31, 2001. The company filed for bankruptcy just days after the federal agency filed its lawsuit.

Kootenai Development Corp., which had purchased some of the former mine property, was also named as a plaintiff.

During a three-day trial in January, the EPA presented its accounting of Libby projects that EPA attorneys argued Grace should pay for - including actual cleanup work, health screenings conducted in coordination with the

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Agency for Toxic Substances and Disease Registry and overhead costs. The total amounted to \$54,527,081.11.

Grace's attorneys and expert witnesses repeatedly questioned the federal agency's accounting procedures, making comparisons to scandals at Enron and WorldCom.

Before the trial, the EPA did report some errors in its accounting, including at least one instance of double-billing.

In Tuesday's order, Molloy said he did not find Grace's arguments credible. He noted that the EPA had discovered the mistakes itself, and Grace was unable to provide examples of continuing problems. He awarded the federal agency the full amount sought from Grace, as well as \$5,231,458 sought from Kootenai Development Corp. Interest payments will be decided after a future hearing.

Because the amount Grace can pay must be determined by a federal bankruptcy court in Delaware, it is unlikely that the EPA will ever receive full payment from the company.

"We will get some of the money back," Peronard said. "Because we filed early, we will get paid out at whatever discount rate the bankruptcy court ultimately comes up with."

And, because it only covers

costs through the end of 2001, this lawsuit does not represent the end of the EPA's requests for payment from Grace. The final cost for a clean bill of health in Libby is likely to be in the range of \$120 million, Peronard said. More than 1,000 residential and business properties in Libby will require some asbestos removal as part of the EPA's ongoing efforts to leave the town as clean and healthy as possible.

The judge's order touched on those future claims.

Molloy ruled that both Grace and Kootenai Development Corp. are responsible for cleanup costs at properties listed in the current lawsuit, but he noted in his order that his judgment "does not extend to other properties ... nor does it extend to issues related to the amount of costs incurred after December 31, 2001."

"The parties are strongly encouraged to resolve among themselves any disputes that may arise," the judge wrote, suggesting that the two sides follow principles outlined in the current order and previous rulings in the case. If the government and the company can't agree, Molloy said he would step back in at the request of either side.

Noting that most cost-recovery cases never even make it to trial, Peronard was not optimistic that future claims against Grace could be resolved out of court.

"It doesn't seem like we ever come to any agreement with Grace on much of anything," he said.